Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-2056, 88-90 and 88-96

In the Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a local community violates the Establishment Clause of the First Amendment when it includes a nativity scene and a menorah in an annual holiday display located on public property.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of Argument	7
Argument:	
The Establishment Clause of the First Amendment does not prohibit a local community from including a nativity scene and a menorah in its annual holiday display	10
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963)	21, 22
Allen v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973)	18
American Civil Liberties Union (ACLU) v. *City of Birmingham*, 791 F.2d 1561 (6th Cir.), cert. denied, 479 U.S. 939 (1986)	14, 16-17
American Jewish Congress v. *City of Chicago*, 827 F.2d 120 (7th Cir. 1987)	14, 15, 17
Board of Education v. *Allen*, 392 U.S. 236 (1968)	13
Board of Trustees of the Village of Scarsdale v. *McCreary*, 471 U.S. 83 (1985)	2
Bowen v. *Kendrick*, No. 87-253 (June 29, 1988)	12
Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973)	20
Donnelly v. *Lynch*, 525 F. Supp. 1150 (D.R.I. 1981)	15
Everson v. *Board of Education*, 330 U.S. 1 (1947)	13
Larson v. *Valente*, 456 U.S. 228 (1982)	20
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	4, 11
Lynch v. *Donnelly*, 465 U.S. 668 (1984)	*passim*
Marsh v. *Chambers*, 463 U.S. 783 (1983)	2, 13, 21
McCollum v. *Board of Education*, 333 U.S. 203 (1948)	21
McCreary v. *Stone*, 739 F.2d 716 (2d Cir. 1984), aff'd, 471 U.S. 83 (1985)	16, 17

Cases – Continued: Page

McGowan v. *Maryland*, 366 U.S. 420 (1961) 13
Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) .. 13
Stone v. *Graham*, 449 U.S. 39 (1980) 22
Tilton v. *Richardson*, 403 U.S. 672 (1971) 13
Wallace v. *Jaffree*, 472 U.S. 38 (1985) 12, 18
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 13, 22, 23
Zorach v. *Clauson*, 343 U.S. 306 (1952) 13, 22

Constitution and regulation:

U.S. Const. Amend. I (Establishment Clause) 4, 7, 10, 17, 21, 22

36 C.F.R. 7.96(5)(x) 1

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INTEREST OF THE UNITED STATES

The United States participates in, or permits on public land, various displays and celebrations relating to the seasons of Christmas and Chanukah. For example, the National Park Service includes a privately-owned nativity scene in its annual government-sponsored Christmas Pageant for Peace, which takes place on public park land (the Ellipse) immediately south of the White House. For a number of years, the Park Service also has granted a demonstration permit to a private group to erect and maintain a menorah on public park land during the holiday season.[1] These and other established practices are called into question by the judgment below.

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[1] For approximately eight years prior to 1986, the menorah was erected in Lafayette Park. In 1986, the National Park Service issued regulations prohibiting structures in Lafayette Park (36 C.F.R. 7.95(5)(x)), and the menorah is now erected in the southwest quadrant of the Ellipse.

More generally, from the earliest days of the Republic to the present, the federal government has felt free to acknowledge and recognize that religion is part of our heritage. The United States thus has a substantial interest in the broader question raised by this case, which is whether the Constitution requires us rigidly to exclude from our public ceremonies and celebrations and from our public lands all acknowledgment of the religious elements in our national traditions. The United States has previously participated as *amicus curiae* in *Board of Trustees of the Village of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and other cases raising this question in a variety of contexts.

STATEMENT

1. For a number of years during the Christmas season, the City of Pittsburgh has placed a large Christmas tree, decorated with lights and ornaments, on the front steps of the City-County Building in downtown Pittsburgh. Since 1982, at the time of the Jewish celebration of Chanukah, the City has erected next to the Christmas tree a privately-owned menorah. In front of the Christmas tree is a large sign bearing the mayor's name that reads:

> SALUTE TO LIBERTY
>
> DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMINDS US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.

Also included in this seasonal display are a sign advertising a charity fund drive, a sign advertising a tropical flower display at the City's Conservatory, and traditional seasonal

decorations in the doorways leading to the interior of the City-County Building. All the elements of the display—the Christmas tree, the signs, the menorah, and the decorations—are installed by city employees. Pet. App. 4a-5a.[2]

One block away from the City-County Building stands the Allegheny County Courthouse. Since 1981, the county has permitted for approximately six weeks each year the display of a nativity scene enclosed by a fence on the grand staircase of the first floor of the courthouse. The creche is owned, erected, arranged, and disassembled by a private organization, and a sign in front of the creche indicates its donor. The county, however, stores the creche in the basement of the courthouse and supplies a dolly and minimal aid to transport it to and from the courthouse basement. The County Bureau of Cultural Programs decorates the area with red and white poinsettia plants, evergreen trees with red bows, and Christmas wreaths. Other seasonal decorations are displayed throughout the courthouse building. Pet. App. 3a-4a.

The first floor of the courthouse is used throughout the year for art displays and other civic and cultural events and programs. During the weeks prior to Christmas, the county sponsors Christmas carol programs. The chorale groups, mostly high school students, stand on the grand staircase behind the nativity scene. They sing popular songs and both religious and secular Christmas carols. The caroling is broadcast by loudspeakers to the public in the courthouse. The program is annually dedicated to the universal themes of world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. Pet. App. 3a-4a.

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[2] "Pet. App." refers to the appendix to the petition in No. 88-90.

2. Respondents brought suit on December 10, 1986, against the City of Pittsburgh and Allegheny County claiming that the inclusion of the menorah and the nativity scene in their annual holiday celebration violated the Establishment Clause of the First Amendment. The district court, following an evidentiary hearing, denied respondents' motions for injunctive and declaratory relief (Pet. App. 34a-40a). Applying the three-pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the court concluded (Pet. App. 40a) that the displays had a secular purpose, that their effect was not to advance or inhibit religion, and that they did not create an excessive entanglement of government with religion.

The district court found that the intention of the City and county was merely "to celebrate the holiday season" and not "to affect anyone's religion" (Pet. App. 36a). The court further found, relying on this Court's decision in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), that the use of the creche and the menorah in the context of the holiday season did not advance religion in any significant way. "In the case of the county," the court noted (Pet. App. 40a), "the creche was but part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon. In the case of the city, if there was any religious significance to the menorah[3], it was but an insignificant part of another holiday display." Finally, the court found (*ibid.*) that the display "did not create an excessive entanglement of government with religion" and that there was no evidence "that the displays have caused political division." The court noted (*id.* at

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[3] The district court found (Pet. App. 39a) that "[t]he Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men.' "

38a-39a) that "[v]ery little, if any, public funds" are expended on the creche and that the expense to the city of erecting the menorah is minimal.

3. A divided court of appeals reversed (Pet. App. 1a-33a). The court acknowledged that *Lynch* v. *Donnelly*, *supra*, had to be "the starting point of our analysis" (Pet. App. 7a), but noted that this Court was "sharply divided" in that case and that "the opinion [for the Court] was tied so closely to the facts involved" that it was "unable to put to rest issues involving use of religious decorations at the Christmas season" (*id.* at 8a-9a). Thus, after describing this Court's holding in *Lynch*, the court of appeals proceeded to make its own application of the three-prong test of *Lemon* v. *Kurtzman* to the facts of this case.

The court of appeals focused its discussion on the second prong of the *Lemon* test, noting (Pet. App. 13a) that "a public entity usually is able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion." With respect to the second prong, the court explained (*id.* at 13a-14a) that a court should consider six separate variables in determining whether a display has the effect of advancing or endorsing religion:

> (1) the location of the display; (2) whether the display is part of a larger configuration including non-religious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.

Based on its consideration of these factors, the court concluded (Pet. App. 14a) that "by permitting the creche

and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion." The court noted (*ibid.*) that "[e]ach display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it." Furthermore, the court stated (*ibid.*), "neither the creche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items. In addition, both the creche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion." Indeed, the court stressed (*ibid.*), "the menorah, unlike the creche, is not associated with a holiday with secular aspects."[4] Finally, the court noted (*ibid.*), "there is public participation, albeit minimal, in both the storage and placement of the displays."[5]

Judge Weis dissented (Pet. App. 16a-33a). He noted that *Lynch* v. *Donnelly* is not only "the starting point of our analysis," but "also ends our analysis" (*id.* at 23a). Judge Weis explained (*id.* at 24a) that the placement of the creche in the county courthouse did not distinguish this case from *Lynch* in which the creche was also displayed "under municipal auspices and encouragement." Judge

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[4] The court of appeals, responding to the district court's finding (Pet. App. 39a) that the menorah "has no particular religious significance," stated (*id.* at 15a) that "regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion."

[5] The court of appeals acknowledged (Pet. App. 15a) that "there is a sign near the creche indicating that the display is a donation of the Holy Name Society," but stated that that factor alone "cannot possibly outweigh the considerations which lead us to find that placement of the creche violated the second prong of the *Lemon* test."

Weis also rejected the majority's emphasis on the paucity of secular decorations displayed along with the creche. He concluded that in *Lynch* it was "the December holiday setting"—not the presence of "plastic Santa Clauses or reindeer"—that negated any message of endorsement of the religious content of the display (*id.* at 28a-30a). In any event, Judge Weis noted (*id.* at 29a), this focus on context, "even if valid, is irrelevant here. The Pittsburgh creche was surrounded by traditional Christmas symbols, including wreaths, evergreen trees, and poinsettia plants, and served as a thematic backdrop for the County's traditional holiday choral program." With respect to the menorah, Judge Weis stated (*id.* at 32a) that "[i]ncluding a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing in its joy. By marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this country."

SUMMARY OF ARGUMENT

In *Lynch* v. *Donnelly*, this Court held that it did not violate the Establishment Clause for the City of Pawtucket, Rhode Island, to include a government-owned creche in the traditional holiday display that it erected each year in a private park in the heart of the town's shopping district. Pawtucket's display of the creche, the Court concluded, served the legitimate secular purposes of celebrating a national holiday through the use of its traditional symbols and depicting the historical origins of that holiday. The Court acknowledged that a creche has religious significance, but concluded that the principal effect of Pawtucket's display was to engender a friendly community spirit of goodwill in keeping with the holiday

season and that any benefit to religion from the display was merely indirect, remote and incidental.

The court of appeals purported to distinguish *Lynch* in three respects. First, the court emphasized that the nativity scene and the menorah at issue here would be displayed on public property, in buildings devoted to the business of government, while the creche in *Lynch* was on private property. Second, the court concluded that the creche and menorah at issue here were not subsumed by a large display of non-religious items, while the Pawtucket creche was part of a Christmas display including numerous wholly secular symbols of the holiday. Finally, the court held that the menorah was subject to a special constitutional disability because, unlike the creche, it is not associated with a holiday with secular aspects.

None of these distinctions will stand scrutiny. The Court in *Lynch* did not rely in any fashion on the happenstance that Pawtucket's Christmas display was on private land. The Court treated the case, quite properly, as one in which the government was responsible for, and identified with, the government-owned display. The purpose and effect of the display—to celebrate a holiday with the traditional symbols of that holiday and to engender a community spirit of goodwill in keeping with the season—are the same regardless of location. If those government-sponsored purposes and effects are legitimate in a private park in the heart of the shopping district, they do not become illegitimate when shifted down the street to the steps or gallery of a public building. The creche and menorah are passive symbols that do not coerce the belief or compel the obedience of visitors with government business. Nor is any special message of endorsement of religion communicated by the location of the displays. Whatever their precise physical location, it is the

overall holiday setting that changes what viewers may fairly understand to be the purpose of the displays and negates any message of endorsement of the religious content of their constituent symbols.

Since the use of the creche as a symbol of the holiday does not constitute a government endorsement of the religious content of that symbol, the government is not required to surround it with candy canes, reindeer, or other purely secular symbols in order to avoid an Establishment Clause violation. In any event, the creche and the menorah here are each part of larger holiday displays that include numerous purely secular decorations as well as express statements of secular purpose. As in *Lynch*, the displays at issue here suggest no endorsement of either Christianity or Judaism.

As to the court of appeals' conclusion that the menorah is not associated with a holiday having secular aspects, there is no dispute that a menorah is part of the Jewish celebration of Chanukah, which falls each year within the Christmas holiday season. Increasingly, private and governmental entities—from public schools to television stations—are accommodating and recognizing celebrations of Christmas and Chanukah together as part of a general holiday season. An objective observer would thus view Pittsburgh's decision to erect a menorah next to the Christmas tree on the steps of the City-County Building not as endorsing Judaism, but merely as recognizing another dimension of the holiday season. Including a menorah in a holiday display broadens the holiday message from one focused on Christmas alone and serves further to emphasize the absence of any sectarian endorsement.

The court of appeals, in striving to limit *Lynch* narrowly to its facts, thus missed the central message of that decision as well as the harmony of that message with this

Court's Establishment Clause jurisprudence. The Court in *Lynch* recognized that accommodation and acknowledgment of religion do not equal endorsement of religion. Religion is inextricably imbedded in our national culture and our official holidays and ceremonies, and it was never the purpose of the Establishment Clause to secularize our public life so rigidly that we cannot continue to mark our public holidays in a manner that includes traditional acknowledgments of their religious character.

ARGUMENT

THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT DOES NOT PROHIBIT A LOCAL COMMUNITY FROM INCLUDING A NATIVITY SCENE AND A MENORAH IN ITS ANNUAL HOLIDAY DISPLAY

The decision of the court of appeals cannot be reconciled with this Court's recent decision in *Lynch* v. *Donnelly*. The Court in *Lynch* recognized, as it has always recognized, that accommodation and acknowledgment of religion do not equal endorsement of religion. Religion is inextricably imbedded in our national culture and our official holidays and ceremonies, and it was never the purpose of the Establishment Clause to secularize our public life so rigidly that we cannot continue to mark our public holidays in a manner that includes traditional acknowledgments of their religious character.

1. In *Lynch*, this Court held that it did not violate the Establishment Clause for the City of Pawtucket, Rhode Island, to include a government-owned creche in the traditional Christmas display that it erected each year in a private park in the heart of the town's shopping district. The display at issue in that case was "essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season" (465 U.S. at 671). It included, among other items,

a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, colored lights, cut-out figures, a large banner reading "Seasons Greetings," and a creche.

The Court recognized (465 U.S. at 674) that there is an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789"[6] and stressed (*id.* at 678) that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by this Court." While thus emphasizing (*id.* at 679) its "unwillingness to be confined to any single test or criterion in this sensitive area," the Court nonetheless "found it useful" to apply the three-part test of *Lemon* v. *Kurtzman, supra.* The Court accordingly inquired whether the City's display of the nativity scene had a legitimate secular purpose, whether its principal or primary effect was either to advance or to inhibit religion, and whether it created an excessive entanglement of government with religion.

"Pawtucket's display of the creche," the Court noted (465 U.S. at 681), "is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes."[7] See *id.* at 691

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[6] The Court cited (465 U.S. at 674-677), among "countless" examples of this official acknowledgment, the employment of congressional chaplains to offer daily prayers in Congress, the celebration of Thanksgiving as a national holiday on which to give thanks for the bounties of Nature as gifts from God, the statutorily prescribed national motto "In God We Trust," the inclusion in the Pledge of Allegiance of the language "One nation under God," the declaration each year of a National Day of Prayer, and the commemoration of such occasions as Jewish Heritage Week and the Jewish High Holy Days.

[7] The Court noted that it "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity

(O'Connor, J., concurring) ("The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."). The Court also agreed with both lower courts that no institutional entanglement was occasioned by the display (*id.* at 684).[8]

With respect to the second prong of the *Lemon* test, the Court concluded that, "notwithstanding the religious significance of the creche" (465 U.S. at 687), the primary effect of displaying the creche was not "to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular" (*id.* at 681). Focusing on "the creche in the context of the Christmas season" (*id.* at 679), the Court noted (*id.* at 683) that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmen-

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was motivated *wholly* by religious considerations." 465 U.S. at 680 (emphasis added). Accord *Bowen* v. *Kendrick*, No. 87-253 (June 29, 1988), slip op. 11 ("a court may invalidate a statute [under this prong] only if it is motivated wholly by an impermissible purpose"); *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985) (emphasis in original) (government action is invalid only if it has "*no* secular purpose").

[8] The Court focused its entanglement inquiry on the extent to which the display required "ongoing, day-to-day interaction between church and state," rather than on the potential "political divisiveness" of the display (465 U.S. at 684); see *id.* at 689 (O'Connor, J., concurring) ("In my view, political divisiveness along religious lines should not be an independent test of constitutionality."). "In any event," the Court noted (*id.* at 684), "apart from this litigation, there is no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration."

tal action,"[9] and concluded (*ibid.*) that "whatever benefit there is [from the display] to one faith or religion or to all religions, is indirect, remote, and incidental." "Even the traditional, purely secular displays extant at Christmas, with or without a creche," the Court noted (*id.* at 685), "would inevitably recall the religious nature of the Holiday." But the principal effect of such displays is to "engender[] a friendly community spirit of goodwill in keeping with the season" (*ibid.*).

In light of our tradition of "accommodation of all faiths and all forms of religious expression" (465 U.S. at 677), the Court stated (*id.* at 686) that "[i]t would be ironic * * * if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so 'taint' the city's exhibit as to render it violative of the Establishment Clause." The Court accordingly concluded (*ibid.*) that "[t]o forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public

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[9] As examples, the Court cited (465 U.S. at 681-682) the expenditure of public money for textbooks supplied to students attending church-sponsored schools, *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and for transportation of students to such schools, *Everson* v. *Board of Education*, 330 U.S. 1 (1947); federal grants for buildings at church-sponsored colleges and universities, *Tilton* v. *Richardson*, 403 U.S. 672 (1971), and other noncategorical grants to institutions of higher education combining secular and religious education, *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); tax exemptions for church properties, *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970); Sunday Closing Laws, *McGowan* v. *Maryland*, 336 U.S. 420 U.S. 420 (1961); release time programs for religious training, *Zorach* v. *Clauson*, 343 U.S. 306 (1952); and the legislative prayers upheld in *Marsh* v. *Chambers*, 463 U.S. 783 (1983).

places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings."

2. The court of appeals focused its own inquiry exclusively on the second prong of the *Lemon* test.[10] In reaching its conclusion that "the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion" (Pet. App. 14a), the court purported to distinguish *Lynch* v. *Donnelly* in three respects. None of these distinctions, however, will stand scrutiny.

a. First, the court of appeals emphasized (Pet. App. 10a-14a) that the nativity scene and the menorah at issue here would be displayed on public property, in buildings devoted to the business of government, while the creche in *Lynch* was on private property. See also *American Jewish Congress* v. *City of Chicago,* 827 F.2d 120, 126 (7th Cir. 1987) ("the display in this case was located within a government building—a setting where the presence of government is pervasive and inescapable"); *ACLU* v. *City of Birmingham,* 791 F.2d 1561 (6th Cir.), cert. denied, 479 U.S. 939 (1986) (enjoining display of creche on lawn in front of city hall). The Court in *Lynch,* however, did not rely in any fashion on the happenstance that Pawtucket's Christmas display was on private land.[11] The Court

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[10] The court acknowledged (Pet. App. 13a) that "a public entity usually is able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion." Thus, the court did not disturb findings by the district court that the intention of the city and county was merely "to celebrate the holiday season" and not "to affect anyone's religion" (*id.* at 36a) and that the displays "did not create an excessive entanglement of government with religion" (*id.* at 40a).

[11] Similarly, we do not believe that the Court should rely in this case on the happenstance that both the creche and the menorah are

treated the case, quite properly, as one in which the government was responsible for, and identified with, the government-owned display. 465 U.S. at 680-681; *id.* at 690 (O'Connor, J., concurring). Moreover, the Court expressly analogized the case to the other situations in which acknowledgments of religion take place on public property. 465 U.S. at 671, 674, 676-677.

Pawtucket's display was in a centrally located park, facing the busiest commercial district, 300 feet from City Hall. *Donnelly* v. *Lynch,* 525 F. Supp. 1150, 1154-1156 (D.R.I. 1981). "The display doubtless got more attention there than it would have in Pawtucket's City Hall, for which it was too big anyway." *American Jewish Congress* v. *City of Chicago,* 827 F.2d at 131 (Easterbrook, J., dissenting). Allegheny County and the City of Pittsburgh are similarly entitled to have their Holiday displays in a central and convenient location. Undoubtedly, Allegheny County could have located its chorale program and Christmas display in an empty lot somewhere, but in December in Pittsburgh few might brave the elements to enjoy it.

The secular purposes of each display—"to celebrate the Holiday and to depict the origins of that Holiday" (465 U.S. at 681)—and the secular effects of those displays—"engender[ing] a friendly community spirit of goodwill in keeping with the season" (*id.* at 685)—are the same regardless of location. And if those government-sponsored purposes and effects are legitimate in a private park in the heart of the shopping district, they do not become illegitimate when shifted 300 feet to the steps or gallery

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privately-owned. Regardless of ownership, both the creche and the menorah are part of government-sponsored displays.

of a public building. See *McCreary* v. *Stone*, 739 F.2d 716, 729 (2d Cir. 1984) ("We fail to find substantiality in this asserted private/public land distinction"), aff'd by an equally divided Court, 471 U.S. 83 (1985).

Furthermore, no special constitutional infirmities attend the location of these displays "at or in a public building devoted to core functions of government" (Pet. App. 14a). The creche and the menorah are merely "passive symbol[s]" (*Lynch*, 465 U.S. at 686) that do not in any respect coerce the belief or compel the obedience of visitors with government business. Nor is any special message of endorsement of religion communicated by the location of the displays at or in government buildings. Whatever the precise physical surroundings, "the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content" (*Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). The display of the creche and the menorah both "serve[] a secular purpose—celebration of a public holiday with traditional symbols" (*id.* at 693). Whether the displays are in a city hall or a city park, the creche and the menorah "cannot fairly be understood to convey a message of government endorsement of religion" (*ibid.*).

b. The court of appeals also attempted to distinguish *Lynch* on the ground that the creche and menorah at issue here could not "reasonably be deemed to have been subsumed by a larger display of non-religious items," while the Pawtucket creche was part of a Christmas display including, inter alia, a Santa Claus house, reindeer pulling Santa's sleigh, a cut-out clown, a Christmas tree, and a talking wishing well (Pet. App. 14a). See also *ACLU* v.

City of Birmingham, 791 F.2d at 1566 (forbidding display of "unadorned creche" not "surrounded by a multitude of secular symbols of Christmas"). But, although this Court in *Lynch* referred to the secular decorations surrounding the creche in that case, the Court made it clear that the relevant context for First Amendment purposes was the "Christmas Holiday season" (465 U.S. at 680), and that within that context it is permissible for the government to acknowledge the historical and religious origins of the season (*id.* at 686). See *McCreary* v. *Stone,* 739 F.2d at 729 ("The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the creche was situated; rather, the Court consistently referred to 'the creche in the context of the Christmas season,' * * * or the 'Christmas Holiday season.' ").

The court of appeals trivialized *Lynch* by claiming that the absence of a cut-out clown, reindeer, or talking wishing well must dictate a different result. Important constitutional issues should not turn on marginal differences in holiday displays. "It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended—but would have been less so were the creche five feet closer to the jumbo candy cane." *American Jewish Congress* v. *City of Chicago,* 827 F.2d at 130 (Easterbrook, J., dissenting). See also *ACLU* v. *City of Birmingham,* 791 F.2d at 1569 (Nelson, J., dissenting) ("I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations"); Pet. App. 30a (Weis, J., dissenting).

The essence of the Court's decision in *Lynch* was that displaying a traditional symbol of a holiday—even if religious in origin and meaning—does not amount to an

endorsement of the religious faith associated with the symbol. 465 U.S. at 683; *id.* at 692 (O'Connor, J., concurring). Pawtucket may display a creche without thereby endorsing Christianity because "the overall holiday setting changes what viewers may fairly understand to be the purpose of the display," and in the context of that setting, the use of a traditional holiday symbol such as a creche "is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood" (*ibid.*). Since use of the creche as a symbol of the Holiday does not constitute a government endorsement of the religious content of that symbol, the government and the courts are not required to engage in reindeer counting to ensure that there are enough purely secular symbols accompanying the creche.

In any event, even if such a contextual inquiry were warranted, it is clear that "an objective observer" (*Wallace* v. *Jaffree,* 472 U.S. at 76 (O'Connor, J., concurring)) would not view the displays at issue here as an endorsement of either Christianity or Judaism. "[T]he creche was but part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon." Pet. App. 40a. It "merely contributes as part of the overall Christmas scene" (*id.* at 35a), along with red and white poinsettia plants, evergreen trees with red and white bows, Christmas wreaths, and other seasonal decorations throughout the building (*id.* at 3a). Moreover, the nativity scene has a sign in front of it noting that it was donated by a private organization (*ibid.*) thus further distancing Allegheny County from any endorsement of the specific religious content of this traditional holiday symbol. See *Allen* v. *Morton,* 495 F.2d 65, 67-68 (D.C. Cir. 1973) (per curiam).[12] The menorah, located on the steps of the City-

[12] Furthermore, the chorale program that uses the creche as a stage setting is expressly dedicated each year to the universal, secular themes

County Building, is also part of a larger holiday display that includes a large, lighted Christmas tree, signs advertising seasonal events, and traditional decorations in the doorways leading to the interior of the City-County Building. Pet. App. 4a-5a. The secular purpose of both the lighted menorah and the lighted Christmas tree is brought home to the viewer by a large sign exhorting passers by to "Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom" (*ibid.*).

c. Finally, the court of appeals concluded that the menorah was subject to a special constitutional disability because "the menorah, unlike the creche, is not associated with a holiday with secular aspects" (Pet. App. 14a). That is simply not true. The menorah is part of the Jewish celebration of Chanukah, which falls each year within the Christmas holiday season. Increasingly, private and governmental entities—from public schools to television stations—are accommodating and recognizing celebrations of Christmas and Chanukah together as part of a general public holiday season. As in *Lynch*, therefore, "[a]lthough the religious and indeed sectarian significance" of the menorah "is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display" (465 U.S. at 692 (O'Connor, J., concurring)).

We believe that an objective observer would view Pittsburgh's decision to erect a menorah next to the Christmas tree on the steps of the City-County Building not as endorsing Judaism, but merely as recognizing another aspect of the holiday celebration. Thus, the mere fact that "the menorah is *associated* with Chanukah, a religious holiday"

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of world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. Pet. App. 3a-4a.

(Pet. App. 15a (emphasis added)), is not a sufficient reason to banish it from public celebrations of the holiday season. To the contrary, including a menorah in a holiday display merely broadens the holiday message from one focused on Christmas alone and serves further to emphasize the absence of any sectarian endorsement.[13] Futhermore, the district court found (Pet. App. 39a) that "[t]he Chanukah menorah has no particular religious significance when placed in a public location beyond signifying a 'Light to the World' somewhat like the Christmas message 'Peace on Earth, Goodwill to Men.' " Display of the menorah, therefore, "cannot fairly be understood to convey a message of government endorsement of religion." 465 U.S. at 693 (O'Connor, J., concurring).

3. Jefferson's celebrated reference to a "wall of separation between church and State" may suggest that all governmental acknowledgments of religion must be condemned. But "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973). Such "total separation" would clearly require an elaborate effort to reshape our practices and rhetoric, one that would betoken "a

[13] We do not, however, agree with petitioner Chabad (88-90 Pet. 10-11) that the City of Pittsburgh is compelled, once it erects a Christmas tree, to include in its display a symbol associated with Chanukah. It is true that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). But *Lynch* makes clear that display of the traditional symbols of a national holiday with religious origins does not constitute religious preferment. 465 U.S. at 687 n.13; *id.* at 688 n.* (O'Connor, J., concurring). Thus, no counterbalancing of such a display is required; indeed, it is simply not possible for the government to give uniform recognition to all religions in the context of commemorating a holiday with specific meaning for one or more religions.

brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). But hostility toward religion is as prohibited by the Constitution as is government establishment of religion. See, *e.g., Lynch,* 465 U.S. at 673; *Zorach* v. *Clauson,* 343 U.S. at 314; *McCollum* v. *Board of Education,* 333 U.S. at 211-212.

The court of appeals, in striving to limit *Lynch* narrowly to its facts, missed the central message of that decision and the harmony of that message with this Court's Establishment Clause jurisprudence. The Court in *Lynch* recognized, as it has always recognized, that accommodation and acknowledgment of religion do not equal endorsement of religion. Our nation is not secular, but pluralistic, and there is nothing wrong with the government attempting to recognize and commemorate the importance of religion in America's historical traditions and cultural heritage. *Lynch,* 465 U.S. at 678. Such recognition constitutes "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh* v. *Chambers,* 463 U.S. at 792.

There are "countless * * * illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Lynch,* 465 U.S. at 677. The creation and maintenance of legislative chaplaincies, and the frequent invocation of God's blessing on all of the Nation's public and ceremonial occasions (see n.6, *supra*), demonstrate the untenability of any suggestion that the government is not free to acknowledge and help commemorate an occasion such as Christmas or Chanukah or that, in doing so, it must somehow contrive to conceal and ignore the religious aspects of these holidays. To state that the government may not prefer one religion over another does

not mean that the government must pretend that certain holidays have no specific meanings to different religions.

What is forbidden under the Establishment Clause are those government practices that coerce religious orthodoxy (*e.g.*, *Stone* v. *Graham*, 449 U.S. 39, 42 (1980)) or that involve the government directly in religious exercises (*e.g.*, *Abington School Dist.* v. *Schempp*, 373 U.S. at 223-224). For the government to participate in holiday celebrations that have religious as well as secular elements, and in that context to acknowledge our religious heritage, is neither a "religious exercise" nor an interference with the rights of conscience of nonbelievers.[14] Religion is inextricably imbedded in our national culture and our official holidays and ceremonies. It pervades our public as well as our private lives because of our history and because recognition of this aspect of our history is of deep concern to many of our people. To ignore this heritage and this deeply felt concern by eradicating all evidence of its influence would be to substitute "callous indifference" for "benevolent neutrality." *Zorach* v. *Clauson*, 343 U.S. at 314; *Walz* v. *Tax Comm'n*, 397 U.S. at 669.

In grappling with the difficult and sensitive constitutional questions in this area, the courts must demonstrate "the ability and willingness to distinguish between real threat and mere shadow." *Abington School Dist.* v. *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring). It is simply not plausible to suggest that the display of a nativity scene or a menorah for several weeks during the holiday

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[14] The district court found that there was no element of coercion in either of the displays at issue here. "[N]one of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays." Pet. App. 35a.

season is "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church." *Walz*, 397 U.S. at 678. If government celebrations of our religious heritage "can be seen as the first step toward 'establishment' of religion, * * * the second step has been long in coming. Any move that realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits' " (*ibid.*). In the meantime, "[a]ny notion that these symbols pose a real danger of establishment of a state church is farfetched indeed." *Lynch*, 465 U.S. at 686.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60764